

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LINDA GREEN**

Claimant

VS.

**THE FLESH COMPANY**

Respondent

AND

**CINCINNATI CASUALTY CO.**

Insurance Carrier

Docket No. **1,053,487**

**ORDER**

Respondent and its insurance carrier request review of the December 9, 2011<sup>1</sup> preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

**ISSUES**

Claimant's job duties included purchasing supplies for respondent at a Sam's Club. Claimant alleged she injured her back loading the supplies into the trunk of her car. When she unloaded the supplies a few days later she alleged she aggravated that back injury. Respondent denied claimant provided timely notice of the injuries or that she suffered accidental injury arising out of and in the course of her employment. The Administrative Law Judge (ALJ) found claimant's accidental injury arose out of and in the course of employment and that claimant gave "adequate" notice of her injury.

Respondent requests review of whether the ALJ erred in finding claimant's accidental injury arose out of and in the course of employment and that she gave timely notice of her accident. Claimant argues the ALJ's Order should be affirmed.

The issues raised on appeal from this preliminary hearing are whether claimant suffered accidental injury arising out of and in the course of her employment and whether she provided timely notice.

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<sup>1</sup> The preliminary hearing was held on April 13, 2011.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant worked as the human resources manager for respondent for approximately four years. It was undisputed that her job duties included going to the Sam's Club (Sam's) in Joplin, Missouri, to buy supplies for the kitchen and coffee machines which were used by respondent's employees. The trip would occur during claimant's regular work hours and was approved by respondent.

On September 30, 2010<sup>2</sup> claimant made the trip to the Sam's and as she was lifting supplies from a cart to the trunk of her car she experienced left-sided back pain. A few days later as she was unloading the supplies her back pain worsened. Claimant testified that she asked a production manager named Donnie Williams for some help unloading and stacking the supplies in a cabinet but the requested help did not show up. Claimant testified that as she continued to lift the supplies above her shoulders to place the supplies into the cabinets, she experienced pain in the left side of her neck and into the shoulder and back.

Claimant testified that the same day she unloaded the supplies she told Barb Eaton, her supervisor, that she had injured her back while unloading the supplies. And claimant testified that she had told Lisa Hennen and Lori Bowman that Mr. Williams did not send anyone to help and her back hurt from unloading the supplies.

Ms. Eaton denied claimant told her she had injured her back unloading supplies at work or that claimant had ever told her she injured her back while working for respondent. Ms. Eaton further testified that she was not aware claimant was alleging a workplace injury until she received a letter from claimant's attorney dated November 17, 2010. Likewise, Ms. Hennen and Ms. Bowman denied any conversation with claimant where she had indicated she hurt her back unloading supplies.

Claimant also testified at preliminary hearing that when she asked Mr. Williams for help unloading the supplies she told him that she had hurt her back loading the supplies and needed help unloading the supplies. But claimant agreed that at a discovery deposition she had testified that she believed the only three people she discussed hurting her back with were Ms. Eaton, Ms. Hennen and Ms. Bowman.

Apparently, respondent had decided to terminate claimant's employment and an advertisement for her position was posted on the internet on September 28, 2010.

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<sup>2</sup> Initially, claimant alleged the incidents occurred October 19 and 21, 2010. But during litigation the receipt from Sam's established the supplies were purchased September 30, 2010.

Claimant was unaware that she was going to be replaced but later was told that she was going to be terminated effective October 29, 2010. In connection with her termination claimant was offered a severance agreement which contained a release provision for any workers compensation claims.<sup>3</sup>

Claimant then sought medical attention with her primary care physician, Dr. Lisa Salvador, on November 19, 2010.<sup>4</sup> The doctor's note indicated a history of an accident on September 29, 2010, while lifting at work. Dr. Edward Prostic then examined claimant on November 29, 2010, at the request of claimant's attorney. Dr. Prostic took a history that claimant had injured herself October 19, 2010 through October 21, 2010.

Initially, respondent argues that claimant failed to provide timely notice of her alleged work-related injury. K.S.A. 44-520 provides:

**Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The evidence established that claimant's trip to obtain the supplies occurred on September 30, 2010. Claimant testified that she suffered an aggravation of her condition when she unloaded the supplies a few days later and that is when she told her supervisor, Ms. Eaton, that she had injured her back. Ms. Eaton denied claimant told her she had been injured. Claimant also testified that she had told two other individuals but they also denied being told by claimant that she had injured herself at work. And regarding Mr. Williams, claimant did not mention him when specifically asked during her discovery deposition if she had told anyone else about her back injury. Moreover, claimant was the

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<sup>3</sup> Claimant argues this document establishes respondent was aware claimant had alleged a workplace injury. Ms. Eaton testified the form was provided before claimant alleged a workplace injury and it was a standard document used in all severance situations.

<sup>4</sup> P.H. Trans., Cl. Ex. 3.

human resources manager and aware of the procedure for providing notice of a work injury.

In this case, claimant alleged injury that initially occurred on September 30, 2010, and then an aggravation a few days later. But it was not until after her employment was terminated and approximately six weeks after her alleged injuries that she first sought medical treatment. Based upon a review of the entire evidentiary record, this Board Member finds the testimony of Ms. Eaton, Ms. Bowman and Ms. Hennen more persuasive and further finds claimant failed to provide timely notice of her alleged accidental injuries.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>6</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated December 9, 2011, is reversed and compensation denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2012.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2010 Supp. 44-555c(k).